

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

Taylor Consultants, Inc.

Appellant

Re: Veteran Enterprise Technology
Solutions

Appealed from
Size Determination No. 2-2009-65

SBA No. SIZ-5050

Decided: July 7, 2009

APPEARANCE

Bryant S. Banes, Esq., Neel, Hooper & Banes, P.C., Houston, Texas, for Appellant.

DECISION

I. Introduction and Jurisdiction

On December 12, 2008, the Department of Army, National Guard Bureau (National Guard) issued Request for Proposals W9133L-09-R-0007 (RFP), which required the successful offeror to provide child and youth training for National Guard Child and Youth Development. The Contracting Officer (CO) set the RFP aside for service-disabled veteran-owned small businesses and assigned North American Industry Classification System (NAICS) code 541990, All Other Professional, Scientific and Technical Services, with a corresponding \$7 million average annual receipts size standard. All offers were due on January 5, 2009. On January 24, 2009, the CO awarded the contract to Taylor Consultants, Inc. (Appellant).

On January 30, 2009, an unsuccessful offeror, Veteran Enterprise Technology Services, LLC (VETS) filed a size protest alleging Appellant is other than small because it is affiliated with Military Personnel Services Corporation (MPSC). On February 2, 2009, the CO requested the Small Business Administration (SBA) Office of Government Contracting, Area Office II (Area Office), determine Appellant's size regarding the RFP. On February 9, 2009, Appellant was notified of the size protest and Appellant protested VETS size status.

On April 28, 2009, the Area Office issued Size Determination No. 02-2009-30, concluding that Appellant is other than small for the annual receipts size standard designated for the RFP. The Area Office noted VETS was an unsuccessful offeror and an interested party with standing to file a size protest. The Area Office also explained that because VETS was not selected for award Appellant's size protest of VETS was premature.

On May 8, 2009, the National Guard canceled its award to Appellant. On that same day, Appellant reasserted its size protest against VETS. On May 11, 2009, the National Guard notified Appellant of award to VETS. On May 12, 2009, Appellant appealed Size Determination No. 02-2009-30 to the Office of Hearings (OHA). *See Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-5049 (2009) (affirming size determination).

On May 12, 2009, the Area Office issued Size Determination No. 02-2009-65 in response to Appellant's size protest of VETS. The Area Office dismissed Appellant's size protest of VETS because Appellant is not an interested party.

For the reasons discussed below, Size Determination No. 02-2009-65 is affirmed.

OHA decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

II. Issue

If the Area Office's decision to dismiss Appellant's size protest was based on clear error of fact or law. *See* 13 C.F.R. § 134.314.

III. Facts

A. The Size Determination

On May 12, 2009, the Area Office issued the size determination dismissing Appellant's size protest.

The Area Office notes Appellant was previously selected for award for this procurement. The Area Office states a size protest was filed against Appellant and Appellant was determined to be other than small in Size Determination No. 02-2009-30. The Area Office asserts Appellant is not an interested party and is ineligible to file a size protest. The Area Office cites 13 C.F.R. § 121.1001(a)(1)(iv) and notes the CO indicated there was more than one small business offeror for this procurement.

B. The Appeal

On May 28, 2009, Appellant appealed the size determination. Appellant asserts the Area Office's size determination contains five clear errors of fact and law: (1) creating a rule that denies a party its substantive and procedural due process; (2) ignoring that Appellant was an awardee at the time of its initial size protest of VETS; (3) ignoring that the Area Office had denied Appellant's prior size protest of VETS because it was not ripe; (4) ignoring 13 C.F.R. § 121.1001, which allows any offer that the "contracting officer has not eliminated for reasons unrelated to size" to protest the size status of another offeror; and (5) showing improper bias against Appellant.

Appellant argues the only time limit imposed by the SBA regulations against offerors is the outer time limit of a protest to be filed within five business days after notification of the identity of the prospective awardee. Appellant asserts the Area Office “made up the ‘ripeness’ requirement” imposed on Appellant. Appeal, at 5. Appellant argues VETS was in line for award and it was improper for the Area Office to refuse to analyze whether VETS was other than small. Appellant asserts the Area Office has created a completely illegal system that grants favoritism to the first concern to lodge a size protest. Appellant distinguishes its case from *Size Appeal of Lajas Industries, Inc.*, SBA No. SIZ-4284 (1997) because Appellant lodged a size protest prior to SBA’s size determination. Appellant asserts it is imperative that it be considered an interested party due to the disparate treatment it has received from the Area Office, specifically the fact Size Determination No. 02-2009-30 was not issued within ten working days.

IV. Analysis

A. Timeliness

Appellant filed its appeal within 15 days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(2).

B. Standard of Review

The standard of review for this appeal is whether the Area Office’s size determination is based upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there is a clear error of fact or law, OHA does not consider Appellant’s size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its size determination upon a clear error of fact or law. See *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review.

C. Size Protests

Appellant argues it has been wrongly prevented from filing a size protest against VETS. First Appellant’s size protest was denied because it was premature, Size Determination No. 02-2009-30,¹ and then Appellant’s size protest was denied because Appellant lacked standing since Appellant was found to be other than small, Size Determination No. 02-2009-65. The threshold issue in this appeal, which ultimately is dispositive, is whether Appellant’s size protests were initiated at the appropriate time.

1. Appellant’s Premature Size Protest

The regulation, 13 C.F.R. § 121.1004(e), requires a size protest filed by any party before notification of the successful offeror to be dismissed as premature. *Size Appeal of Department of the Air Force*, SBA No. SIZ-4720 (2005); *Size Appeals of IQ Solutions, Inc., and Substance Abuse and Mental Health Administration, Department of Health and Human Service*, SBA No. SIZ-4711, 3 (2005); *Size Appeal of Barbosa Group Incorporated d/b/a Executive Security*, SBA

¹ Determination No. 02-2009-30 was affirmed in *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-5049 (2009).

No. SIZ-4565 (2003). SBA was explicit when it promulgated the regulation. SBA stated that by restricting the filing of size protests until an apparent successful offeror is identified “SBA does not impose the burdens of an unnecessary size investigation on other offerors or expend its limited resources rendering size determinations that are unlikely to have any practical significance for the procurement in question.” 59 Fed. Reg. 39,426, 39,427 (Aug. 3, 1994). The importance of 13 C.F.R. § 121.1004(e), as expressed in SBA’s policy in promulgating the regulation, does not hinge on notice, but on the selection of an apparent successful offeror; SBA’s intention, as expressed in its commentary on the regulation, was to prevent unnecessarily burdening businesses with size investigations and to focus SBA’s resources on businesses where it is clear they are the potential awardees.

In this case, after VETS filed a size protest of Appellant, the successful offeror, Appellant immediately responded by protesting the size of VETS. Appellant’s size protest was premature because VETS was not identified as a successful offeror. To allow retaliatory size protests against offerors who have not been identified as potential awardees would unnecessarily saddle area offices with numerous needless size determinations, as well as encumber businesses with pointless size investigations. Such a practice would protract the size protest process for all and would not yield benefits for small businesses.

Because 13 C.F.R. § 121.1004(e) makes Appellant’s size protest premature, the Area Office had to dismiss Appellant’s size protest in Size Determination No. 02-2009-30.

2. Appellant Lacked Standing to File a Size Protest after Appellant Was Deemed Other than Small

OHA has previously addressed the question of whether an offeror who exceeds the size standard has standing to file a size protest. *Size Appeal of Solano Garbage Company*, SBA No. SIZ-4312 (1998) (dismissing a large business’s size protest for failing to demonstrate it was the only offeror other than awardee); *Size Appeal of Lajas Industries, Inc.*, SBA No. SIZ-4285 (1998) (finding an other than small business has standing to protest and to appeal the resulting size determination, when only one offeror to the procurement remains). In prior cases, OHA interpreted the term “any offeror” in 13 C.F.R. § 121.1001 to exclude offerors disqualified from participation in a small business set-aside due to size. *Size Appeal of Lajas Industries, Inc.*, SBA No. SIZ-4284, at 4 (1997) (affirming Area Office’s dismissal of an other than small business’s size protest for lack of standing).

Those decisions predate a change in the regulation. In 2004, the language of 13 C.F.R. § 121.1001(a)(2)(i) (2004) was changed from “Any offeror,” to “Any offeror whom the contracting officer has not eliminated for reasons unrelated to size.” 69 Fed. Reg. 29,192, 29,200 (May 21, 2004) (codified as amended at 13 C.F.R. § 121.1001(a)(2)(i) (2006)).

As noted in *Size Appeal of Global McKissack Partners, LLC*, SBA No. SIZ-4807 (2006), the amended regulation seems to provide more specificity. Nevertheless the language of 13 C.F.R. § 121.1001(a)(2)(i) is cumbersome. The regulation employs negative syntax to delineate its bounds and is dependent on two successive alternatives: (1) whether a contracting officer has eliminated an offeror from a procurement; and (2) whether elimination was related or

unrelated to size. The regulation does not require an offeror to meet the first hurdle to proceed to the second. Thus, a straightforward reading of the regulation could rest solely on the second question of whether an offeror's disqualification was related to size. Thus, reasonable men could conclude the language is ambiguous and I find, depending on how it is read, the regulation could connote different meanings.

The purpose of 13 C.F.R. § 121.1001 is to give standing to businesses whose successful protest would enable them to compete in the procurement. 67 Fed. Reg. 70,339, 70,345 (Nov. 22, 2002) (discussing proposed amendment to 13 C.F.R. § 121.1001). The regulation denies protest standing to offerors who have been eliminated for reasons unrelated to size since they would be unable to compete for award even if their protest was successful. Conversely, the regulation enables firms eliminated based on size to file size protests since they would be eligible to compete if the protest is successful and the contracting officer resolicits the procurement on an unrestricted basis.

Accordingly, a reasonable reading of the regulation allows businesses who have been eliminated due to size to file a protest. If the offeror was disqualified for reasons related to size, the protest may proceed; where if an offeror is eliminated for reasons unrelated to size, they have no standing to file a size protest. Despite the text of 13 C.F.R. § 121.1001(a)(2)(i), the right of other than small businesses to file a size protest is still limited by 13 C.F.R. § 121.1001(a)(1)(iv), which states: "A concern found to be other than small in connection with the procurement is not an interested party unless there is only one remaining offeror after the concern is found to be other than small."

In Size Determination No. 02-2009-65, the Area Office specifically noted in dismissing Appellant's size protest that the CO "advised that there was more than one small business offeror for this procurement." Thus, Appellant, a disqualified offeror where there is more than one small business offeror for the procurement, lacks standing to protest the size of VETS for this procurement.

V. Conclusion

The Area Office's size determination is AFFIRMED; the appeal is DENIED.

THOMAS B. PENDER
Administrative Judge